Filed 3/7/19 P. v. Andrade CA2/5
Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EMANUEL RODRIGUEZ ANDRADE, Defendant and Appellant.	B280096 (Los Angeles County Super. Ct. No. VA141361)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Robert J. Higa, Judge. Affirmed as modified.

Maser Law Group, Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Emanuel Andrade was convicted of six misdemeanors and seven felonies, all committed within the span of three weeks against a girlfriend (victim). The felony convictions were for carjacking (Pen. Code,[1] § 215; count 1), false imprisonment (§ 236; count 3), criminal threats (§ 422; count 4), residential robbery (§ 211; count 6) and three counts of willful corporal injury to the victim within seven years of a previous domestic violence conviction (§ 273.5, subd. (f)(1); counts 2, 7, 9).[2] He was sentenced to the aggregate term of 43 years to life. The sentence included a 35-years-to-life term plus three consecutive terms of 32 months each for the three section 273.5 convictions (one-third the four-year midterm, doubled).

Defendant first contends the trial court's error in permitting him to stipulate—without a full advisement and waiver of his rights—to the prior domestic violence conviction that was an element of the three section 273.5, subdivision (f)(1) convictions was prejudicial and compels reversal of those counts. He also challenges the trial court's admission of evidence of his parolee status and gang involvement, the sufficiency of the evidence to support the first degree robbery conviction, and the failure to award presentence conduct credits. Finally, defendant contends that remand is necessary to allow the trial court to exercise its discretion whether to strike a prior serious felony conviction enhancement under section 667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

---

1 Undesignated statutory citations are to the Penal Code.

2 The victim had seven children. Defendant was acquitted of one count of felony child abuse against one of them.

We previously affirmed the judgment. (*People v. Andrade* (June 15, 2018, B280096) [nonpub. opn.].) After our remittitur issued, defendant filed a motion to recall the remittitur, which we granted in order to reinstate defendant's appeal. We further construe defendant's motion to include a request for rehearing, which we likewise grant. We thus reissue our opinion, with modification.

We agree defendant was entitled to presentence conduct credits and modify the abstract of judgment to reflect credits of 47 days. We further agree that a remand is appropriate to permit the trial court to exercise its discretion under Senate Bill No. 1393. In all other respects, the judgment is affirmed. Although the trial court erred in permitting defendant to stipulate to the prior conviction without a full advisement of his rights and waiver of them, the error does not compel reversal. Defendant failed to obtain a ruling in the trial court to the admission of evidence of his parolee status and forfeited that argument on appeal. The trial court did not abuse its discretion in admitting the victim's statements concerning her belief that defendant was in a gang as one reason she feared his threats. Substantial evidence supported the first degree robbery conviction.

FACTUAL BACKGROUND

Defendant had been released from jail on February 5, 2016, after having been convicted on February 3, 2016 of misdemeanor domestic violence against the victim. A criminal domestic violence protective order issued on the date of defendant's conviction and was served on him the day of his release.

Defendant was prohibited from having any contact with the victim.[3]

Defendant lived with his mother and brother next door to the victim's apartment, where she lived with her children from other relationships. Between February 14, 2016 and March 2, 2016, defendant engaged in series of violent interactions with the victim.

The victim was a reluctant prosecution witness.[4] She did not recall contacting the police concerning defendant or how she sustained a number of injuries. She denied defendant ever hurt her or that she was afraid of him. Virtually all the prosecution evidence was in the form of audio recordings–the two 911 calls by the victim and her follow-up recorded interviews with the responding officers–and testimony by the officers themselves.

1. The February 14, 2016 Incident

Events on this date resulted in defendant's being convicted in count 9 of felony domestic violence and in count 15 of

---

[3] By the time of trial, in September 2016, the victim was almost eight months pregnant with defendant's child. She testified she became pregnant during the month of February 2016, but did not learn of the pregnancy until after defendant was arrested for the offenses in this case.

[4] She proved to be a more willing defense witness, testifying she was never afraid of defendant, he never hit her, her children had good relationships with him, and she wanted the restraining order removed. The victim explained she had "to go along" with the detectives or risk losing her children through Department of Children and Family Services proceedings and forfeiting funds promised to her to help her relocate.

misdemeanor contempt. The victim first reported these crimes on February 17, 2016, in an interview with City of South Gate Police Officer Derrick Marin, who was dispatched in response to her 911 call. The officer recorded the interview. He testified and the audio recording was played for the jury.

On February 14, defendant argued with the victim outside her apartment and "eventually dragged her through some bushes she had out front." Officer Marin observed and photographed bruising on the victim's left leg that she said defendant caused.

2. The February 17, 2016 Incident

Most of Officer Marin's recorded interview with the victim concerned the offenses committed on this date. The victim called 911 at 7:55 a.m. on February 17, 2016 to report a "break in and . . . an auto theft." She told the 911 operator defendant was "actually my ex-boyfriend and he just got out of jail. I have a restraining order. His parole officer [requested] a restraining order. He shouldn't be near me. He broke into my house. He took my car keys [and] my car . . . ."

In the recording, the victim began by telling Officer Marin "half [the] South Gate [Police Department] already knows [defendant]. . . . They're always here. They arrested him already [because] he beat the [expletive deleted] out of me in front of my kids." Turning to the reason for the 911 call, the victim said defendant was in her living room before 6:00 a.m., holding her car keys. The victim grabbed for the keys, and she and defendant began fighting. Defendant threw her around the room by the hair.

Her children woke up, and the victim told her eight-year-old daughter to run out the window. The victim was holding her

infant son, but defendant knocked her to the floor. He left, but returned at about 7:30 a.m. and entered her apartment through the window, prompting the victim to make the 911 call.

Officer Marin photographed the victim's injuries, including the bruises on her right arm and a laceration to her finger she received "during the struggle" with defendant for her keys.

During the interview, the victim's daughter confirmed defendant was arguing with her mother about the keys. Defendant hit her mother and brother, who was in her mother's arms.[5]

3. The March 2, 2016 Incident

City of South Gate Police Officer Anthony Reyes was dispatched to the victim's residence in response to the 911 call she made March 2, 2016. He photographed her injuries and recorded the interview conducted in her home and a subsequent telephone conversation later the same morning. Officer Reyes testified, and all three recordings were played for the jury.

The victim told the officer defendant punched her in the face, injuring her eye and lip. Defendant threatened to hurt her and her family and she feared he would inflict harm because he was a gang member who used methamphetamine. She tried to escape two or three times, but defendant prevented her from leaving by hitting her and throwing her to the floor.

After Officer Reyes's in-person interview, he telephoned the victim to confirm the details of the crimes. In that recorded interview, the victim advised defendant did not have permission to enter her home or take her car. Defendant threatened her:

---

[5] By the time of trial seven months later, this daughter could no longer recall any of the events that occurred on this date.

"[Defendant] was just cussing [the victim] out the whole time. He was saying that if [she called] the cops - - [he would be] heartless and he was gonna do whatever it took to hurt [her] and [her] family." He also told her that "if [she] tried to leave, . . . he was gonna send somebody for [her] grandma. To get [her] grandma."

Defendant became distracted on his phone at some point, giving the victim the opportunity to "grab[] the baby" and follow her children out the unlocked front door. Defendant chased her and took hold of her hoodie, but lost his grip. The victim managed to make it onto the stairs, where defendant grabbed her keys from her pocket. He took the key to the club steering wheel locking device and threw the other keys back to her.[6]

The victim and the children kept running toward her vehicle. The victim managed to insert her key into the vehicle's door lock, but defendant "punched [her] in the mouth." Defendant then drove off in her vehicle.

According to the officers, it was the victim who suggested they keep her residence under surveillance until defendant returned. At approximately 6:00 p.m. that evening, Officer Reyes saw defendant park the victim's car in the shopping center parking lot next door. The police attempted to apprehend defendant, but he ran into his mother's home, which was across the driveway from the victim's residence.

A barricade situation and nine-hour stand-off ensued. SWAT officers eventually deployed tear gas into the house and attic. Defendant ran onto the roof in a final attempt to flee, but then surrendered.

---

[6] Defendant had taken the spare vehicle key on an earlier occasion.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged defendant with three counts of felony injury to a girlfriend within seven years of a prior domestic violence conviction (§ 273.5 subd. (f)(1); counts 2, 7, 9)–one for each date defendant assaulted the victim–along with three misdemeanor counts of contempt of court for violating the restraining order (§ 166, subd. (c)(1); counts 11, 14, 15). As a result of the February 17, 2016 incident, defendant was also charged with one count of felony child abuse (§ 273a, subd. (a); count 8). The March 2, 2016 altercations resulted in defendant's being charged with the following additional felonies: carjacking (§ 215, subd. (a); count 1); false imprisonment (§ 236; count 3); criminal threats (§ 422, sub. (a); count 4); and first degree residential robbery (§ 211; count 6). He was also charged with misdemeanor aggravated trespass (§ 602.5, subd. (b); count 10); and two counts of misdemeanor resisting arrest (§ 148, subd. (a)(1); counts 12, 13). Various enhancements were also alleged for defendant's prior violent or serious felony convictions and prior prison terms.

The trial court granted defendant's motion to bifurcate the trial of the prior conviction allegations. During a pretrial Evidence Code section 402 hearing, the trial court also ruled the recordings of the 911 calls on February 17, 2016 and March 2, 2016 were admissible. After the trial judge announced the tapes would be admissible, defense counsel asked that language concerning defendant's parole status, gang membership, and recent release from jail be sanitized. The trial court did not rule on defense counsel's request.

During voir dire, the trial court read the charges against defendant, including language in the information that alleged the

felony crime of injuring a girlfriend "was committed . . . within seven years of [a] previous conviction under Penal Code section 273.5." Defense counsel did not object until the following day, when he requested to "start over with jury selection . . . with a whole new panel" because the prospective jurors heard the charges included a previous domestic violence conviction. The trial court denied the request, noting the prior conviction was an element of the charged offenses and agreeing with the prosecutor that she had the burden to prove it.

Before opening statements, defense counsel made a section 402 motion to exclude evidence of defendant's gang involvement. The prosecutor responded that defendant's gang involvement was relevant to the fear element of the criminal threats charge (§ 422, subd. (a); count 4). The trial court admonished the prosecutor not to ask the victim directly about defendant's gang membership, but explained if the victim mentioned it as a reason for her fear of defendant, the court would allow such testimony because it went to her state of mind, in issue on the criminal threats charge. The trial court further indicated if the victim denied she was afraid of defendant, she could be impeached by prior inconsistent statements in which she admitted her fear of defendant and her reasons for it.

During trial and notwithstanding the trial court's ruling on the issue of defendant's gang involvement, the prosecutor asked the victim directly if she told the police she thought defendant was a member of the Lynwood Traviesos gang and a user of methamphetamine. Defense counsel's immediate objection was sustained, and the question was stricken. Defendant's request for a mistrial was denied.

Through the unredacted 911 tapes and the victim's recorded in-person and telephone interviews on February 17, 2016 and March 2, 2016, with the investigating officers, the jurors heard references to defendant's parolee status, recent incarceration, and the victim's out-of-court statement that she thought defendant belonged to a gang and used methamphetamine. During his direct testimony, Officer Reyes testified the victim told him that one reason she feared defendant "was he was a known gang member from Lynwood."

In addition, Officer Eder Vergara, one of the officers surveilling the victim's residence on March 2, 2016, who remained on the scene for defendant's eventual apprehension, testified without objection that he "knew [defendant] was a parolee at large and had a no bail warrant along with [being] wanted for domestic violence." He added that "based on . . . previous incidents" he knew defendant "like[d] to run out the back door . . . ."[7] Officer Vergara also explained the standoff turned into a "SWAT situation" "based on [defendant] being a parolee at large, considered armed and dangerous, [and] his criminal history."

On the next court date after Officer Vergara testified, defense counsel made a belated objection and requested a mistrial based on the officer's testimony regarding his assignment to the gang unit and defendant's parolee at large status. Although defense counsel asked the trial court to admonish the prosecutor not to bring up defendant's "parolee status or anything pertaining to a gang from here on out," he did not ask the trial court to strike the testimony in question or

---

[7] Defense counsel's lack of foundation and relevance objections to that testimony were overruled.

admonish the jury. Defense counsel also "ask[ed] for a mistrial . . . based on Officer Vergara's use of those terms." Nevertheless, during the ensuing colloquy with counsel, the trial court reiterated that defendant's gang involvement was only relevant to the victim's state of mind and impeachment, and directed the prosecutor to inform the jury during argument that although the victim may have believed defendant was a gang member, there was no evidence that he was a gang member.[8]

At the conclusion of the prosecution's case, the prosecutor offered to stipulate that "defendant . . . was previously convicted on February 3rd of 2016 in the County of Los Angeles, State of California, Superior Court in Case No. 5DY09187 of the crime of violating Penal Code section 273.5(a), injuring a spouse, cohabitant, boyfriend, girlfriend or child's parent." Defense counsel agreed and also stipulated the previous conviction was a misdemeanor. The trial court accepted the stipulation without advising defendant of any rights, securing defendant's waiver or asking if he joined in the stipulation.

The defense called three witnesses: the victim, defendant's other girlfriend, and defendant's sister. The defense focused on the animosity between the victim and the other girlfriend, who thought she was in an exclusive relationship with defendant, but learned defendant was cheating on her with the victim.

The jury acquitted defendant on the child abuse charge, but found him guilty on all other counts. The trial court sentenced

---

[8] The prosecutor adhered to the trial court's admonition and said this in closing argument: "We haven't heard any evidence about gang affiliations. You're not to consider that in any other way. You can consider that as to the reasonableness of [the victim's] fear. What she believed at the time."

defendant to an aggregate prison term of 43 years to life and awarded defendant 315 days of actual custody credit, but no conduct credit.

DISCUSSION

A. Failure to Advise of Trial Rights on Prior Domestic Violence Conviction

Relying on *People v. Cross* (2015) 61 Cal.4th 164 (*Cross*), defendant contends the trial court prejudicially erred when it accepted his stipulation to admit the prior domestic violence conviction charged as an element of counts 2, 7, and 9, without first advising him of his trial rights and obtaining his knowing and voluntary waiver of them. The trial court did err, but we do not find the error to be prejudicial.

As in this case, the defendant in *Cross* was charged with felony infliction of injury on a girlfriend with the added allegation that he had a previous domestic violence conviction within the past seven years. The potential punishment upon conviction of this offense is two, four, or five years; a conviction of felony infliction of injury without a prior conviction carries a potential sentence range of two, three, or four years. (*Cross, supra,* 61 Cal.4th at p. 169.)

The stipulation in *Cross* was offered during the direct examination of the prosecution's first witness. (*Cross, supra,* 61 Cal.4th at p. 180.) The trial court accepted it without addressing Cross directly and "without advising Cross of any trial rights or the penal consequences of admitting a prior conviction." (*Id.* at p. 169.) Cross was convicted of the offense and sentenced to the upper term of five years.

The Supreme Court reversed. Because the stipulation established "every fact necessary to support . . . [a] definite *exposure* to additional punishment," it triggered the advisement and waiver requirements set forth in *In re Yurko* (1974) 10 Cal.3d 857. (*Cross, supra,* 61 Cal.4th at p. 175.) The failure to comply with those requirements was error. The error was reversible because the record, reviewed in its totality, failed to affirmatively demonstrate that Cross entered into the stipulation knowingly and voluntarily, i.e., that he understood "'he had a right not to admit the prior conviction and, thus, not to incriminate himself.'" (*Id*. at p. 179.)

Here, by contrast, a review of the entire record demonstrates defendant's stipulation to the prior misdemeanor domestic violence conviction was knowing and voluntary. Defendant has a lengthy criminal record, which is "relevant to [his] knowledge and sophistication regarding his [legal] rights." (*Cross, supra,* 61 Cal.4th at p. 180, internal quotation marks omitted.) Defendant's criminal history began when he was 16 years of age with the first of two burglary convictions. As an adult, before the trial on these offenses, defendant pleaded guilty to robbery (§ 211), being a felon in possession of a firearm (Former § 12021, subd. (a)(1)), and burglary (§ 459). He also had been convicted of numerous misdemeanors. Defendant's sentence for his conviction of being a felon in possession of a firearm was enhanced based on a prior strike conviction.

In addition, defendant was present in court when his retained counsel asked to bifurcate the trial on defendant's prior felony convictions. In the middle of voir dire, defense counsel approached the prosecutor and indicated defendant would be willing to enter into a plea. (See, e.g., *People v. Vest* (1974) 43

Cal.App.3d 728, 736 ["when a plea is entered with counsel, and it appears or can be inferred from the record that prior thereto defendant has consulted with him it is presumed, in the absence of evidence to the contrary, that counsel has informed him of the various rights which are waived by a plea of guilty"].)

Later the same day, defense counsel made the belated objection to the court's reading of that portion of the information that alleged defendant's previous domestic violence conviction. In the ensuing discussion, the prosecutor made it clear the prior conviction was "an element of the crime that [she had] to prove." The trial court concurred: "That's what it is."

The stipulation to the prior domestic violence conviction was entered into at the close of the prosecution case–after all the officers testified and all the audiotapes were played–just before the prosecution rested and the defense made a motion to reduce the February 14, 2016 and February 17, 2016 felony charges of infliction of injury on a girlfriend to misdemeanors. After a few back and forth statements, the trial court unequivocally confirmed with counsel that defendant stipulated to the prior misdemeanor domestic violence conviction.

Defendant has extensive experience with the criminal justice system. His willingness to enter into the stipulation was consistent with his earlier stipulation to bifurcate the prior serious and/or violent felony convictions alleged in the information. That decision demonstrated a sophisticated understanding of the prosecution's burden of proof on prior conviction allegations and the potential strategic benefit of not placing formal documentary proof of those convictions before the jury.

The circumstances here stand in stark contrast to those in *People v. Daniels* (2017) 3 Cal.5th 961 (*Daniels*), the decision defendant cites. In *Daniels*, the defendant was charged with noncapital and capital crimes. He waived counsel and, representing himself, pleaded guilty to the noncapital offenses and admitted two prior convictions. (*Id.* at p. 989.) Still representing himself, he waived a jury as to the guilt, special circumstances, and penalty phases of the capital proceedings. (*Id.* at pp. 990, 995.) He was convicted and sentenced to death. On appeal, the Supreme Court unanimously agreed the defendant's waiver of the jury trial for the penalty phase of the capital proceedings was neither knowing nor voluntary, and reversed.

People v. Mosby (2004) 33 Cal.4th 353 (*Mosby*) provides a more apt analysis. There, after the jury returned a guilty verdict on the pending charge of selling cocaine, the defendant waived trial on a prior conviction, but not "the concomitant rights to remain silent and to confront adverse witnesses." (*Id.* at p. 356.) He then admitted a prior conviction for possessing cocaine.

Based on the totality of the circumstances, the Supreme Court determined the waiver was knowing and voluntary and affirmed defendant's conviction. *Mosby* emphasized the differences between a trial on a pending criminal charge and a trial on a prior conviction, noting the latter "is 'simple and straightforward,' often involving only a presentation by the prosecution 'of a certified copy of the prior conviction along with defendant's photograph [or] fingerprints' and no defense evidence at all. [Citation.] Here, defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify . . . . Thus, he not only would have known of, but had just

exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*Id.* at p. 364.)

Applying *Mosby, supra,* 33 Cal.4th 353, we note the stipulation was offered at the conclusion of the prosecution's case-in-chief, when the only evidence left to introduce concerned defendant's prior domestic violence conviction. Given the totality of the circumstances surrounding defendant's stipulation to the prior domestic violence conviction and defendant's criminal history, which included previous guilty pleas and one sentence enhancement for a prior conviction, we conclude the stipulation was knowing and voluntary and defendant was not prejudiced by the trial court's failure to advise him of his trial rights before accepting it.

B. Admission of Evidence Concerning Defendant's Parolee Status

The jury learned of defendant's parolee status through the victim's 911 call and Officer Vergara's testimony. Citing Evidence Code sections 1101 and 352, defendant contends this was impermissible character evidence and more prejudicial than probative.

But defendant did not raise those specific objections in the trial court when the judge announced the recordings of the 911 calls could be played for the jurors. Nor did he renew the objections when the tapes were played. And defendant failed to make a timely objection during Officer Vergara's testimony.

Rather, the day *after* the officer testified, defense counsel objected "to Officer Vergara's use in his testimony of 'parolee at large.' [The officer] stated that he knows [defendant] to be a parolee at large, and he also said that he rolled up in a gang unit or he's from a gang unit. And that's extremely prejudicial."[9]

At that point, defense counsel sought only an admonition that the prosecutor was not to bring up parolee status or gang membership again and requested "a mistrial based on those - - based on officer Vergara's use of those terms." He presented no argument or authorities in support of the request for mistrial. Significantly, he did not ask the trial court to strike the officer's testimony or admonish the jury.

Pursuant to Evidence Code section 353, a judgment will not be reversed based on the erroneous admission of evidence unless an objection or motion to strike the evidence is timely, made "clear the specific ground of the objection or motion," and the reviewing court concludes "the error or errors complained of resulted in a miscarriage of justice." *People v. Partida* (2005) 37 Cal.4th 428 (*Partida*) held, "In accordance with this statute, we have consistently held that the defendant's failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable. [Citations.] [¶] . . . [¶] The objection requirement is necessary in criminal cases because a contrary rule would deprive the People of the opportunity to cure the defect at trial and would permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction

---

[9] Although it is not clear from the record, we assume the "extremely prejudicial" objection applied to both defendant's parolee status and the victim's testimony that he was a gang member.

would be reversed on appeal. [Citation.] The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." (*Id*. at pp. 433-434, internal quotation marks omitted.)

Defendant's failure to timely object and to state the specific basis for a late objection resulted in his forfeiture of this challenge to the verdict and the denial of his motions for mistrial. (*People v. Bemore* (2000) 22 Cal.4th 809, 845-846 ["Under the circumstances, the trial court had no opportunity to consider the objection and give appropriate admonitions when the alleged misconduct first occurred, or to prevent additional remarks of a similar nature from being made. Hence, the issue has been waived on appeal"].) It would be fundamentally unfair to the trial court and the prosecution to allow defendant to raise this evidentiary claim of error here without first giving the trial court and the prosecutor the opportunity to avoid the error or blunt any effect. (*Partida, supra,* 37 Cal.4th at p. 435; see also *People v. Abel* (2012) 53 Cal.4th 891, 924 ["A defendant who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error"].)[10]

---

[10] In his reply brief, defendant suggests that, to the extent his retained trial counsel failed to adequately object to the references to his parolee status, he received ineffective assistance of counsel. The record on appeal does not affirmatively demonstrate there could be no satisfactory explanation for trial counsel's failure to

The circumstances here are not similar to those in *People v. Yeoman* (2003) 31 Cal.4th 93, where the Supreme Court held, "[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*Id.* at p. 117 [Supreme Court considered defendant's claim, raised for the first time on appeal, under *Batson v. Kentucky* (1986) 476 U.S. 79].) Here, presumably for tactical reasons, defendant never asked the trial court to consider whether striking the testimony and admonishing the jury could effectively cure any prejudice.

C. Admission of Gang Evidence

Defendant contends the trial court erred when it allowed, over his objection, the prosecution to impeach the victim with her prior statements to police concerning defendant's gang membership. According to defendant, that evidence violated the prohibition against the admission of character evidence in Evidence Code section 1101 and, in any event, was more prejudicial that probative under section 352. He also complains

---

object, and we cannot conclude in this direct appeal that defendant received ineffective assistance of counsel. "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

admission of Officer Vergara's testimony that he surveilled the victim's residence from his "gang unit car" (presumably as a member of a gang task force) was unduly prejudicial.

As with the parolee evidence, defendant did not make an Evidence Code section 1101 objection to the gang evidence.[11] Defendant did not make a timely objection to Officer Vergara's testimony, nor did he ever ask the court to strike that testimony or admonish the jury. These claims of error are forfeited.

This leaves the challenge to the victim's statements to police concerning defendant's gang membership, to which defendant did timely object. As described above, the victim told Officer Reyes she reasonably feared defendant's threats against her and her family because he was a gang member and used methamphetamine. The prosecutor did not heed the trial court's admonition not to introduce the gang statement unless the victim either (1) admitted she was afraid of defendant, in which case it would explain her fear; or (2) denied she was afraid of defendant, in which case it would impeach her credibility. But defense counsel's prompt objection was sustained, and the prosecutor's question was stricken. After the victim denied under oath that she was afraid of defendant, Officer Reyes testified without objection to the victim's out-of-court statement concerning why she took defendant's threats seriously. Also, as noted in footnote 8, the prosecutor explained to the jurors in closing argument that

---

[11] Defense counsel's only objection during Officer Vergara's testimony was to the witness's use of the word victim when referring to the victim: "I'm going to object to the term 'victim' being used. Character evidence." The objection was overruled, and defendant does not raise this as an issue on appeal.

the gang testimony could only be considered to gauge the reasonableness of the victim's fear.

In light of the record on the issue of defendant's gang involvement, the trial court did not abuse its discretion by admitting the testimony and limiting the manner and extent to which the jury could consider it.

D. Sufficiency of Evidence of First Degree Robbery

Defendant maintains there was insufficient evidence to support the guilty finding on the first degree residential robbery charge in count 6. According to defendant, although he may have used force inside the victim's home on March 2, 2016, to intimidate and prevent her from calling the police, there was insufficient evidence to show such force was motivated by the intent to steal. As defendant views the evidence, his intent to steal the key to the locking device on the victim's vehicle was formed, if at all, on the stairs outside her residence.

Section 211 defines robbery as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 212.5, subdivision (a) defines first degree residential robbery as follows: "Every robbery . . . which is perpetrated in an inhabited dwelling house . . . or the inhabited portion of any other building is robbery of the first degree." Where a robbery is not committed inside the confines of a dwelling proper, "the essential inquiry is whether the structure is 'functionally interconnected with and immediately contiguous to other portions of the house.' [Citations.] 'Functionally interconnected' means used in related

or complementary ways. 'Contiguous' means adjacent, adjoining, nearby or close. (See Webster's New Internat. Dict. (3d ed. 1986) p. 492 ['Adjacent . . . next or adjoining with nothing similar intervening . . . not distant . . . touching or connected throughout']; see also Black's Law Dict. (6th ed. 1990) p. 320, col. 2 ['[i]n close proximity; neighboring; adjoining; . . . in actual close contact'].)" (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107.)

A challenge to the sufficiency of the evidence requires us to "review the entire record in the light most favorable to the judgment, and affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences drawn therefrom." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1044.) Under this analysis, there was substantial evidence of force and fear to support the first degree robbery conviction.

A reasonable inference from the evidence is defendant's insistence that the victim stay in the apartment was tied to his efforts to take her car; if the victim left with the children, she would take the car he wanted. The victim tried unsuccessfully to flee the apartment with her children and get to the safety of her car multiple times that morning. In one attempt, several children made it onto the porch before defendant grabbed the victim's four-year-old daughter and threw her back into the living room. The other children returned inside. Defendant stood in the doorway, blocking it, and argued with the victim about taking her car. Defendant, who had been striking the victim throughout the morning, again hit her as she held her baby. The victim finally fled out the door, and defendant ran after her. He removed the key to the steering wheel lock as soon as he grabbed her on the stairs.

A rational trier of fact could conclude his assaults on the victim and her children were motivated, in part, by the intent to steal her vehicle, as he had done on February 17, 2016. The force and intimidation that defendant used against the victim and her small children inside her residence supported a reasonable inference that, in addition to preventing the victim from calling police, defendant intended to take the victim's vehicle that day using whatever force, intimidation and fear required to overcome her resistance. That defendant's actual taking of the key to the locking device may have occurred at the bottom of stairs "functionally interconnected" to the residence does not alter the inference supported by the evidence that defendant formed the intent to take the key inside the residence and employed force and fear inside that location, in part, to further that taking.

E. Presentence Custody Credits

Defendant contends, and the Attorney General agrees, that he was entitled to an award of 47 days of conduct credit, in addition to the award of 315 days of actual custody credit made by the trial court. According to defendant, under section 2933.1, subdivision (a),[12] he was entitled to a presentence conduct credit award of 15 percent of his actual period of presentence confinement.

In cases in which the defendant is convicted of a violent felony listed in section 667.5, subdivision (c), section 2933.1 authorizes an award of presentence conduct credit, but limits

---

[12] Section 2933.1, subdivision (a) provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

that award to no more than 15 percent of a defendant's actual presentence confinement. Because defendant was convicted of multiple violent felonies listed in section 667.5, subdivision (c), he was entitled to an award of presentence conduct credit as calculated under the 15 percent limitation in section 2933.1, subdivision (a), i.e., 47 days.

F. *Senate Bill No. 1393*

Senate Bill No. 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a)(1) in furtherance of justice. Defendant contends that in light of Senate Bill No. 1393 we must remand this matter to the trial court to allow it to exercise its discretion whether to strike his section 667, subdivision (a)(1) enhancement. The Attorney General agrees as do we.

DISPOSITION

The abstract of judgment is ordered modified to reflect 47 days of presentence conduct credits. The cause is remanded to the trial court to permit the court to consider whether to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.